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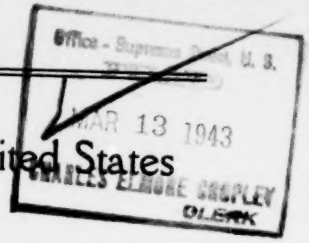

Supreme Court of the United States

OCTOBER TERM, 1942.

IN THE MATTER OF ACQUIRING TITLE
by
THE CITY OF NEW YORK to certain lands under water, lands under water filled in, wharf property, wharfage rights, incorporeal hereditaments, together with riparian, franchise and incorporeal rights, if any, not now owned by The City of New York, situated on WARD'S ISLAND, in the Borough of Manhattan, City of New York, selected as a site for a public park, and approved according to law.

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Claimant-Appellants,

THE CITY OF NEW YORK,
Respondent,

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC.,
and LAWRENCE WARDS ISLAND REALTY COMPANY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

GLEN N. W. MCNAUGHTON,
Of Counsel.

January, 1943.

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and LAWRENCE WARDS ISLAND REALTY COMPANY,
Petitioners.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

To the Honorable the Supreme Court of the United States:

The petitioners above named respectfully show:

The United States is interested in this proceeding. It holds a deed of conveyance to it from the City of New York, (Rec. p. 204) for a portion of Damage Parcels Nos. 5 and

5A (Rec. p. 28) the title to which parcels have been awarded herein to the City of New York, and for which damages have been awarded to the City of New York as owners of the entire parcels for the sum of one dollar ($1.) for each parcel, though the area involved in the lands under water filled in contained in the Damage Parcel 5 portion covered by the deed of conveyance aforesaid to the United States of America is about 159 feet wide along the foreshore sea wall, and 55 feet deep, and the portion of underwater lands not filled in covered by said deed and contained in Damage Parcel 5A is about 159 feet wide by 300 feet more or less in depth, or over an acre in area, and for which the usual award in condemnation proceedings in accordance with the present theory of appraisal of market value in this vicinity at the very lowest $1. per square foot, and the award to the owner thereof should be not less than Forty-four thousand dollars ($44,000.), and the award to the lands under water filled in, the portion in Damage Parcel No. 5, should be at the rate of double that under water in accordance with the usual value of appraisal in this vicinity, or over $2. per square foot, or over the sum of $16,418.00, or a total of $60,418 which the United States may claim as its award if fair, just and adequate compensation be paid in this proceeding. (See Rec. p. 518, Map U. S. Lighthouse, Third District) (Rec. page 452. Sketch accompanying Sinking Fund Proceedings, showing lands under water and lands under water filled in) (Rec. page 418, Sinking Fund Proceeding Minutes of the City of New York, and Rec. page 7 for final decree awarding title and damages for entire parcels Nos. 5 and 5A herein to The City of New York.)

The United States is not a party hereto, and should intervene and join in the position for a writ of certiorari herein.

The dispute is as to title and value.

This is an appeal from an order of affirmance of the Court of Appeals of the State of New York affirming an order of affirmance of the Appellate Division of the

Supreme Court of the State of New York, First Department of the final decree of Mr. Justice McLaughlin in this condemnation proceeding, which acquired for park purposes land under water and filled in land around Wards Island.

Metropolitan-Columbia Stockholders, Inc., appeals with respect to Damage Parcels Nos. 16, 16a, 16c and 16d, and Lawrence Wards Island Realty Company appeals with respect to Damage Parcels Nos. 5, 5a, 9, 9a, 17, 17a and 25a, Damage Map (opp. p. 28 Rec.).

This condemnation proceeding was begun in connection with development of a public park by the City on Wards Island, which is located in the Borough of Manhattan, County of New York, at the East and Harlem Rivers, and Little and Big Hell Gate.

The land condemned was land under water and land filled in in 1937, but originally in 1811 at the time the predecessors in title to the claimants herein acquiring title thereto by grant from the State of New York, all foreshore and land under water. The Grant from the Commissioners of Land Office of the State of New York was of all the foreshore and land under water surrounding Wards Island, the land under water being 150 feet outward from the foreshore on the northwest side of Wards Island, and 300 feet outward from the foreshore from the balance of the Island.

The dispute arises as to the ownership of the lands under water and foreshore condemned in this proceeding, and awards therefor.

The claimant-appellant petitioner Metropolitan-Columbia Stockholders, Inc., holds title to Damage Parcels Nos. 16, 16a, 16c and 16d. The Trial Court held that title to damage parcels 16, 16a and 16d were in the City of New York, and title to damage parcel 16c was in the Metropolitan-Columbia Stockholders, Inc.

The Lawrence Wards Island Realty Company holds title to Damage Parcels 5, 5a, 9, 9a, 17, 17a and 25a. The Trial Court held that title to Damage Parcels Nos. 5, 5a,

9, 9a and 17, was in the City of New York, and that the Lawrence Wards Island Realty Company was the owner of Damage Parcels 17a and 25a.

The City claims title to all of the land included in the condemnation proceeding.

The claimant petitioners contend (1) the City has no riparian rights of easement from its upland lots over the foreshore and lands under water owned by the claimants herein adjacent to the City's upland holdings as these rights of easement of passage were forfeited by the City and/or its predecessors in title of the upland by the illegally filling in by them of the foreshore and the building of a seawall along it over the lands of claimants, without the consent of the claimants or their predecessors in title. The City claims it has riparian rights of access and egress to the river channel over claimants underwater lots from City's upland holdings adjoining.

Claimant petitioners contend (2) that if the City has such riparian easements of passage, the exercise of this right of passage and wharfing over the claimants underwater lots and carrying goods and passengers over the foreshore of claimants is only an exercise of a right of easement of passage, and is not an act by the City of hostile occupancy, open and notorious with a claim of title in fee simple by the City, and that they were under an implied grant arising by implication from the deeds of conveyance to the City of its upland adjacent to the foreshore passed over in egress and access and wharfing out by building docks thereon for communication to the River Channel.

The claimants petitioners contend that the riparian rights, if any, of the City, are only a right of reasonable passage, and do not exhaust the uses of the filled in lands and lands under water belonging to claimants. (See *Inwood Hill Park,* 219 A. D. 478, 220 N. Y. S. 298; *Hedges* v. *West Shore,* 150 N. Y. 150; *Barnes* v. *Midland,* 193 N. Y. 378, at 386.)

Claimant petitioners further contend that it is not necessary to fill in the lands under water to build docks or

warehouses on such docks, and that as a matter of fact and usage all docks surrounding the Island of Manhattan are built on piles and not on solidly filled in lands under water, and that therefore these underwater lands herein condemned are of substantial value, and claim that therefore the Trial Court erroneously held that the condemned parcels of lands under water are without market value, and that said holding is contrary to law requiring just compensation under the federal and state constitutions be paid for property taken by condemnation (Rec.—final decree, fols. 19-35; *Appleby* vs. *City of New York*, 271 U. S. 364, at 402).

The City contends that the land under water must be filled in to have substantial value.

Claimant petitioners contend that the federal government under rules of the War Department controlling navigable rivers prohibits the building of wharves on filled in lands beyond the bulkhead line of solid fill, and only permits wharfing to be built outward of that line of solid fill to the pier head line, on piles driven into the lands under water. That therefore the right to build docks on piling on lands under water without filling in makes those lands under water of substantial value, as it cheapens the cost of building the wharves, and increases the revenues from wharfage. The entire theory of Mr. Justice McLaughlin in holding lands under water must be filled in to be valuable is contrary to the theory and practice of the War Department prohibiting those lands from being filled in, but allowing docks to be built on piling (see *Inwood Hill Park* case, *supra*) where an award of $251,707.26 was awarded for 573,854 square feet of land under water owned by the City, and subject to riparian easements of upland owners who were private corporations and individuals. This case held, at page 301, that these lands have substantial value, and it might be leased to be used for dock purposes and a large revenue result.

The *North River Water Front* case, *Matter of City of New York*, 219 A. D. 87, reversed the decision of the lower

court and sustained a substantial value of about $2,272,-808.41 for two parcels of lands under water and filled in lands, amounting to about 100,000 square feet each. It was the opinion of the lower court that it might be more costly to fill in this land than it would be worth after filling in, but the Appellate Division of the First Department sustained the condemnation award. This came up during the *Appleby* case, 271 U. S. 373.

The *Main Street* case, 216 N. Y. 67 (City Island) held that the public right and private right of passage did not exhaust the use of underwater property, and that the owners must be compensated.

The City claims title by adverse possession to Damage Parcels 16d and 17. Claimant petitioners contend that the Trial Court erred as a matter of law in awarding title to these lots to the city on the grounds of adverse possession. (Rec. fols. 76-81, fols. 19-35.) That the use by the City to dock out and pass over these parcels was one of the right of easement only. That the filling in of the foreshore and building of the seawall along it were not improvements amounting to adverse possession, being merely passing over the property. There were no buildings on it, nor was it ever fenced in for the required statutory period necessary to prescription or to found it upon the theory of a lost grant. Such filling did not prevent any one of the public from walking over the land filled in after filling in. Such filling must be by the legal owner. The records show no evidence of cultivation or cutting timber, and the Damage Map (Rec. p. 28) shows only docks and railroad tracks and coal hoppers on these properties Damage Parcel 17, which were merely used to exercise the rights of passage and hauling goods across them stored in transitu on the docks or foreshore. Petitioners contend the decree of the Trial Judge was contrary to law, and that the affirmance of it by the Appellate Courts was contrary to law of adverse possession of Sections 35 and 37, Civil Practice Act, and of the common law.

The claimant petitioners contended that the Trial Court erred in awarding Damage Parcels 5, 5a, 9, 9a, 16 and 16a,

to the City for the reason these parcels adjoined the upland holdings of John Fleetwood Marsh, who in 1811, when the original grant was made by the State in common to all the upland owners applying for the grant, was not a signer of the original application for the grant, and yet was an owner at the time the grant was made. An original applicant, Bartholomew Ward, had deeded some of his holdings to Marsh before the grant was delivered, but had not recorded his deed until 1812, a year after the grant was made. This is a mere presumption that Marsh was the owner, and claimant petitioners contend that this presumption was rebutted by the fact that the Attorney General of the State of New York, a member of the Land Office Commission making the grant, had made an examination as to all owners, and reported in 1810 before the grant was made, that it was being made to all the owners of the upland on Wards Island, and that the applicants for it were all the owners thereof. The City contends to the contrary, that title passed to the upland to Marsh on delivery of the deed from Bartholomew Ward.

Claimant petitioners contend that Bartholomew Ward was never the owner of upland adjacent to the westerly half of Damage Parcels 9 and 9A, and that therefore the award of such westerly half to the City is contrary to law as based on deed to John Fleetwood Marsh. Claimant petitioners contend that the award of title to the City of Damage Parcels 5, 5A, 9, 9A, 16 and 16A is contrary to law as the matter is *res adjudicata* by reason of the decree in the *Beach* v. *Mayor* partition action of 1870, 45 Howard 357, to which the City was a party, and which claimed title to all these parcels, and that this question can not be now raised herein.

Mr. Justice McLaughlin in the trial court made an award of one dollar ($1.) to petitioner claimant Metropolitan-Columbia Stockholders, Inc., for Damage Parcel 16C, and the same amount to Petitioner Claimant Lawrence Wards Island Realty Company for Damage Parcels 17A and 25A for 7⅓ acres of land under water, which is located

in the busiest waterfront section of New York Harbor, saying this was the actual value (See Rec. fols. 19-35). Your petitioners contend that such award is contrary to Section 1, Article XIV of the Constitution of the United States of America, and to Section 6, Article 1, of the Constitution of the State of New York, as it constitutes a taking of claimants' property without due process of law, and is a taking of private property without just compensation.

We urge as grounds for certiorari the following:

1. The award of one dollar ($1.00) as actual value of each of Damage Parcels 16C and 17A and 25A is contrary to the United States Constitution and Constitution of the State of New York, and contrary to decisions of this Court in the *Appleby* case (*supra*), *Inwood Hill Park* case, *supra*, *N. Y. Waterfront* case (*supra*). The act of the U. S. Navy in paying into the U. S. District Court of the Southern District of New York, the sum of $2,610,000. for condemnation of the lands under water and pier at the foot of 46th Street and the Hudson River in the spring of this year as evidence of fair value, for a plot of land under water about 1000 feet long and 125 feet wide, and the pier on piling, is a fair indication of market value of lands under water. This is the pier where the U. S. S.S. Lafayette sank.

2. That the decree of the trial judge is contrary to law as to parcels 5, 5a, 9, 9a, 16 and 16a, as the title to them is *res adjudicata,* and they belong to claimants herein.

3. That the Trial Court in awarding Damage Parcels 16D and 17 to the City has misconstrued the law of adverse possession and is contrary to the provisions of Sections 35 and 37 of the New York Civil Practice Act.

4. That the Trial Court in holding the lands under water have no actual value unless filled in is contrary to the theory of value as established in New York State, and is contrary to laws of the United States governing navigable waters. That the practice of the War Department is not to permit the filling in of lands in navigable river by solid

fills as it cuts down the tidal capacity of the river, increases the rival tidal currents, and increases the costs of navigation, hence the prices of commodities carried by waterborne commerce.

5. That the property claimed by adverse possession by the City was never fenced in by the City or its predecessors in title, and was never occupied by it under color of title, as the lease by the City of New York to the State of New York of Wards Island is too vague, being merely of "its interest in Wards Island," to cover the lands of claimant petitioners. (See *Mare Island Navy Yard* case, decided by this Court in June, 1942; *Stewart* v. *U. S.*, 62 Supreme Court 1154, 1158.)

6. That the use of easement of riparian owners must be reasonable and are not a broad easement, and that Justice McLaughlin's holding the upland owners have a broad easement of access is contrary to decisions of this and other courts of the State of New York, and is detrimental to national interests throughout the nation if such theory is sustained by this Court. (See *Hedges* v. *West Shore, supra; Barnes* v. *Midland, supra.*)

7. That the filling in of the foreshore by the upland owner was an illegal trespass and destroyed his riparian rights. See *Tiffany* vs. *Oyster Bay*, 134 N. Y. 15, and *Harway* v. *Partridge*, 203 A. D. 174, which were entries under color of title, and made exceptions to the general rule that trespass in filling in cut off wrongdoers' easement of passage. (See *Blakeslee* v. *Commissioners of Land Office*, 135 N. Y. 447, 450.)

8. That a navigable river is a public highway from high bank on one side to high bank on the other, and can not be filled in without consent of the State and Federal Governments. (See Cooper's Justinian, Title II, Twelve Tables, sections 1 to 5, page 68, as to civil law governing riparian rights.) Therefore that the decree of trial court is contrary to law.

9. That the State of New York was trustee in liquidation of Damage Parcels 16, 16a, 16c and 16d, from 1911 to 1933, as this property was in the hands of the Superintendent of Insurance of the State of New York as liquidator for the Columbia Life Assurance Society, predecessor in title to Metropolitan-Columbia Stockholders, Inc., and therefore that the State of New York as tenant of this property could not be used to hold possession of it adversely for the City of New York, as it would be using the possession of trustee adversely to its trust, contrary to law. (See *Michoud* vs. *Girod*, 4 How. 502, *Jackson* v. *Smith*, 254 U. S. 586, *Magruder* v. *Drury*, 235 U. S. 106, 149 U. S. 181, *Davis* v. *Gray*, 16 Wall. 203, 217, *in re Gilbert*, 276 U. S. 294.)

10. The lease by claimant Metropolitan-Columbia Stockholders, Inc., to M. & J. Tracy of lands under water on Damage Parcel Nos. 16a and 16c for erection of a tie rack to moor coal barges shows a substantial value can be obtained by rentals of land under water not filled in (Rec. p. 434) and the lease in 1907 by the New Jersey Central Railroad of lands under water in the Harlem River at 10¢ per square foot per annum and its renewal at 15 cents per square foot in 1937 by the City of New York to the said railroad for erection of a slip bridge, for 5 years, with privilege of renewal for another 5 years, shows substantial value of lands under water subject to upland riparian rights (Rec. p. 121).

11. Assessment of taxes on lands under water of claimant petitioners (See Damage Map, p. 28) and receipt of taxes by the City since 1870 on underwater lots to 1936, refute the claim of adverse possession by the City, and the attempt by the City to foreclose tax liens on Damage Parcel Nos. 16, 16a, 16c and 16d, and the payment by the said claimant of $20,909.91 to the City for taxes, estops the City from setting up ownership by adverse possession. (See Rec. pp. 278, 496a.)

12. Claimant petitioners contend decision of Judge Leventritt (in *Reynolds* v. *Britton*, N. Y. Law Journal,

Jan. 7, 1907), that filling in land under water and building a sea wall were not acts of adverse possession on the foreshore of Wards Island, show the decision of the trial court in the instant proceeding to be erroneous and contrary to law.

13. That Wards Island is connected by vehicular access with Manhattan by reason of the Triborough Bridge and connecting vehicular traffic bridges from Randall's Island that were built in 1936 and 1937, before the condemnation proceeding herein, and therefore the values of underwater lots and lands filled in on Wards Island are greater since the construction of these bridges; and, being at the mouth of the Harlem River, these lots are of greater value than those further up the Harlem River because of the higher cost of towage of boats the further up the river they must be towed due to passing bridges and danger of collision with bridge piers in the center of the Harlem River. That the Harlem River is one of the busiest water transportation highways in New York Harbor and a boat terminal yard tie rack is necessary for mooring of boats there in order to take favorable tides to railroad terminals in New Jersey, which can not be reached in one tide, and therefore tie racks and dolphins made out of piles erected on lands under water are valuable structures as they would yield substantial revenues if built by claimants on their underwater lots.

14. That the grant by the State in 1811 to the Wards and Lawrences, then owners of all the uplands on Wards Island, contained the implied agreement by the Grantor States that it would not grant the same lands to anyone else if the original grant were defective. The petitioners herein claim for this reason the Grant by the State of New York in 1888 to the City of New York of lands under water not previously granted located in the Harlem River around Wards Island, did not convey to the grantee the lands under water previously granted to the original owners of upland on Wards Island in 1811, and that the pro-

vision, excepting lands under water previously granted, in the Grant of 1888, applies to the Damage Parcels of petitioners herein (Rec. p. 217.)

15. That the Grant of 1811 by the Commissioners of Land Office was not governed by any statutory provision of the State of New York restricting grants of lands under water surrounding Wards Island to the adjacent upland owners, as that restriction was not extended to Wards Island until 1813. Your petitioners therefore contend that the deeds to John Fleetwood Marsh dated 1810 did not invalidate the grants of lands under water taken in common by the Wards and Lawrences.

16. That title in claimants since 1811, or in their predecessors in title, recognized for over 125 years, and taxed by the City since 1870, should not now be disturbed, and that at this late date the City is estopped from claiming title. (Rec. p. 49¢a.)

There is presented herewith a certified transcript of the record in this cause in the Court of Appeals of the State of New York.

WHEREFORE petitioners respectfully pray for the allowance of a certiorari to the Court of Appeals of the State of New York, to the end that this cause may be certified to this Court for determination by it as provided in 28 U. S. C. A., Sec. 347(a).

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and the case is such that the prayer of the petition should be granted.

ARCHIBALD N. JORDAN.